

S. B. Thomas, Inc. and Lynn Bell. Case 22-CA-9688

June 22, 1981

DECISION AND ORDER

On February 19, 1981, Administrative Law Judge D. Barry Morris issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief responding to Respondent's exceptions and supporting its cross-exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, S. B. Thomas, Inc., Totowa, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT engage in surveillance of union activities, including the distribution of leaflets, by photographing such activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.

S. B. THOMAS, INC.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge: This case was heard at Newark, New Jersey, on September 2 and 3, 1980. A charge was filed on January 8, 1980, and a complaint was issued on March 28, 1980, and amended on September 2, 1980, alleging that S. B. Thomas, Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, to produce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs were filed by the General Counsel and Respondent.

Upon the entire record of the case, including my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a New Jersey corporation engaged in the manufacture, sale, and distribution of baked goods. Its principal office and place of office is in Totowa, New Jersey. During the 12 months preceding the issuance of the complaint, Respondent sold baked goods valued in excess of \$50,000 to customers located outside the State of New Jersey. Respondent admits, and I so find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The complaint, as amended, alleges that Respondent violated Section 8(a)(1) of the Act by directing Lynn Bell, an off-duty employee, to cease distributing leaflets and leave its facility, and by photographing the leafleting activities. Respondent denied the allegations, claiming that Bell was not an employee of Respondent. The issues are:

1. Was Bell an off-duty employee of Respondent.
2. Was Respondent permitted to direct Bell to cease distributing union leaflets to its employees and leave its facility.
3. Was Respondent permitted to photograph the leafleting activities.

B. The Facts

1. Background

In May 1979 Bell began working for American Bakeries Corporation, herein called American, where she was represented for collective-bargaining purposes by Local 50, Bakery, Confectionery, and Tobacco Workers' Union, AFL-CIO, herein called the Union or Local 50. On October 5¹ she and four other American employees

¹ All dates refer to 1979 unless otherwise specified.

filed a decertification petition to decertify Local 50 as their representative. The petition was dismissed because it was not timely filed. However, Bell was informed by a representative of the National Labor Relations Board that the American employees were part of a bargaining unit which consisted also of employees of Continental Baking Company and Respondent, and that any decertification petition would have to be supported by signatures of at least 30 percent of the employees in these three shops. The dismissal of the decertification petition was appealed and the appeal had not been decided as of the time of this hearing.

Bell testified that the decertification petition was filed because the American employees believed that they were not receiving adequate representation from Local 50 and that the Union forced them to accept their current collective-bargaining agreement, which had not been approved in the American shop. As a result of the dismissal of the petition, Bell and several other employees formed the Committee for a Fair and Honest Union. The purpose of the committee was to keep Local 50 membership informed as to the status of the decertification petition and to supply information concerning the collective-bargaining agreement. In this connection, the committee started a newsletter called *Bakers' Voice*, which was distributed in the various shops represented by Local 50. Bell testified that the committee had reports that Respondent's employees had similar problems with Local 50 and that they had also attempted to file a decertification petition. Additionally, the committee sought the support of Respondent's employees in the event that the appeal of the dismissal of the decertification petition was granted and subsequent additional signatures would be needed for the requisite 30-percent showing of interest.

2. Bell's status as an off-duty employee

As stated earlier, Bell's employment with American commenced in May. She was laid off in September. She was then employed by two other companies, unrelated to either American or Respondent, and she returned to American in July 1980.

3. Multiemployer association

Respondent is part of a multiemployer association whose members include Respondent, American, and Continental. Respondent's director of industrial relations testified that the purpose of the association is to negotiate wage increases and benefits for their employees who are members of Local 50. The members of the Association participate in joint negotiations which culminate in a collective-bargaining agreement which covers areas such as wages, welfare, pensions, sick pay, holidays, and vacations. In addition, each association member signs a separate collective-bargaining agreement with Local 50 that deals with unique working conditions as they concern each individual member.

4. Leafleting activities

Bell and her companion, Gary Hansjergen,² first went to Respondent's facility on November 27 to distribute copies of the *Bakers' Voice*. The leafleting occurred at the back gate of Respondent's plant which is situated in a small industrial park and has a parking lot enclosed by a wire fence. The fence has a gate with two swinging doors that open inward into the parking lot. Each of the doors is approximately 10 feet wide and the driveway is approximately 20 feet wide. Outside the fence there is a grassy area enclosed by a curb. The area is fairly isolated with a limited amount of traffic and no pedestrians.

On November 27 Bell and Hansjergen were at Respondent's back gate from approximately 1:30 to 3:30 p.m., during a shift change. They were distributing copies of the *Bakers' Voice* by standing to the side of the driveway, holding up the copies as cars approached. If the cars slowed down or stopped, the driver would be handed a copy and either Bell or Hansjergen would briefly explain their reason for being there. If an employee wished to speak at length, he would speak to Bell. If the car stopped and there was another car behind, either the car in front would proceed, or the car behind would pull around the stopped car. During the time that Bell and Hansjergen were there approximately 30 to 40 cars passed through the gate.

The facts are in dispute as to where Bell and Hansjergen were standing. On direct examination Bell testified that she stood on the grassy area between the gate and the street. Respondent's witnesses, on the other hand, testified that Bell and Hansjergen were standing inside the parking lot. Thus, Roberts testified that Bell was standing between 6 to 10 feet inside the gate; Hollingsworth testified that Bell distributed some leaflets approximately 30 feet inside the gate; Jackson testified that Bell and Hansjergen were about 6 to 8 feet inside the gate; and Mertz testified that Bell and Hansjergen were distributing the newsletters approximately 10 feet inside the gate. Hansjergen testified that he and Bell were standing on both sides of the gate. On cross-examination Bell admitted that she was standing 1 or 2 feet inside the gate. Except for the distance inside the gate, it appears that the testimony is not conflicting. The gates swing into the parking lot and, as noted above, each gate is approximately 10 feet wide. Both Bell and Hansjergen testified that they were at the gate and Bell conceded that she was 1 or 2 feet inside the gate. Accordingly, based on the testimony, I find that Bell and Hansjergen were distributing the leaflets several feet inside the parking lot and thus on Respondent's property.

During the leafleting, Bell and Hansjergen were approached by one of Respondent's security guards and a police officer. Hansjergen credibly testified that the guard approached him and told him that Respondent did not want Bell and Hansjergen leafleting at the gate and would like them to leave. Subsequently, a policeman came, asked Bell and Hansjergen for identification, and

² Hansjergen, a taxi driver, was not employed by any association member nor was he a member of Local 50. His sole reason for leafleting was to assist Bell.

stated that he had received a call from the Company about their activities. The policeman then drove inside the parking lot, went to the guardhouse, and returned a few minutes later. He told Bell and Hansjergen not to go on company property and not to block traffic. The policeman did not issue a summons nor did he erect a barricade for traffic control.

Bell and Hansjergen returned to Respondent's facility on December 27 about the same time in the afternoon, when the shift was changing. Again they stood at the same location, at the gate, several feet inside the parking lot, on Respondent's property. This time they were distributing the next edition of *Bakers' Voice*. As before, their method of distribution was to hold up copies of the paper as the cars came by. If the car slowed down they would then approach the car and hand the paper to the car's occupants. Again there was little traffic going in and out of the driveway. During the time period that Bell and Hansjergen were there, approximately 20 to 30 cars pulled in and out of the driveway. The same guard asked them to leave. Subsequently, Arlene Mertz, Respondent's supervisor of guards, drove out of the parking lot, parked across the street from the gate, rolled down her window, pointed a camera at Hansjergen, and snapped a picture. Hansjergen credibly testified that Mertz told him that she worked for the security department of Respondent and that the Company did not want any leafleting and did not want Bell and Hansjergen on company property. Shortly after this episode, a police officer arrived. He asked Bell and Hansjergen for identification and also asked one of Respondent's employees, who at the time was talking to Bell, to supply identification. The policeman then went inside the parking lot to the guardhouse and returned a few minutes later with Mertz. The policeman told Bell and Hansjergen that they were not permitted to be on company property and that they could not block traffic. The policeman did not issue a citation to anyone nor did he erect a barricade for traffic control.

C. Discussion and Analysis

1. Bell's status as an off-duty employee

Bell testified that she was laid off from American in September 1979, then worked for two companies unrelated to American and returned to American in July 1980. When asked whether the jobs with the other two companies were on a full-time basis, Bell replied that "they were full time but I was waiting to be recalled."

In *D. H. Farms Co.*, 206 NLRB 111, 113 (1973), the Board, in considering voting eligibility of laid-off employees, stated that the critical question which must be answered is whether the laid-off employees enjoyed a "reasonable expectancy of recall." The Board reaffirmed its position that the resolution of the question "depends on objective factors, including the past experience of the employer, the employer's future plans, and the circumstances of the layoff, including what the employees were told as to the likelihood of recall." To like effect is *Acme Industrial Company, Subsidiary of Jergens, Inc.*, 227 NLRB 249, 250 (1976), cited by the General Counsel.

In the instant proceeding the only evidence relating to the question of whether Bell enjoyed a "reasonable expectancy of recall" was her testimony that "I was waiting to be recalled." There was no evidence adduced with respect to the "objective factors" called for in *D. H. Farms, supra*. The record contains no evidence concerning such factors as the Employer's experience, future plans, circumstances of the layoff, whether there was a decline of sales, etc. Indeed, there was even no testimony with respect to what Bell was told as to the likelihood of recall. Accordingly, I conclude that the General Counsel has not made the requisite showing that Bell enjoyed a reasonable expectancy of recall. Therefore, I find that, during the period of her leafleting activities, Bell was not an off-duty employee of American.

2. Leafleting

The General Counsel concedes that if, as I have found, Bell was not an off-duty employee, the Court's decision in *N.L.R.B. v. Babcock & Wilcox Company*, 351 U.S. 105 (1956), would control. In that case the Supreme Court held (at 112) that an employer may prohibit a nonemployee from distributing union literature on company property "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" Indeed, in its brief the General Counsel recognizes that "if Bell is found not to be an off-duty employee, but rather a non-employee organizer she would have to consider alternative means of communication first, before asserting her rights to be on the Employer's property."

Bell testified that she could have distributed the leaflets in the grassy area between the fence and the public street. While she conceded on cross-examination that she was standing 1 or 2 feet inside the gate, on direct examination she testified that she was not standing on company property when distributing the leaflets. In addition, it appears from the record that, after the police officer spoke to Bell and Hansjergen, the two continued to distribute the leaflets outside the gate, off Respondent's property.³

As noted previously, I have found that Bell and Hansjergen were distributing the leaflets in the parking lot, on Respondent's property. It has not been shown that other means of communication were unavailable. On the contrary, the record indicates that Bell considered the grassy area between the fence and the road adequate for the distribution.⁴ Accordingly, I conclude that Respondent did not violate the Act by directing Bell and Hansjergen on

³ Hansjergen testified that the policeman told him "you can go about your business here" but "you can't be on company property." Similarly, I credit the following testimony of Mertz:

Q. When the police arrived where were they?

A. They were out on the street; they went off of the company property.

⁴ Bell testified that on a third occasion, January 10, 1980, she distributed leaflets "on the grassy section and on the curb."

two occasions to cease distributing literature and to leave its facility.⁵ The allegations are therefore dismissed.⁶

3. Photographing of the leafleting

The evidence shows that on December 27, while Bell and Hansjergen were distributing the leaflets, Mertz parked her car across the street from the gate and attempted to photograph the leafleting. Mertz first rolled down her window to take a picture and then got out of her car to attempt to photograph Bell's face.⁷ I credit Mertz' testimony that at the time the picture was taken Bell and Hansjergen were inside the gate, on company property, and that there was one employee at the gate "who had stopped to receive a pamphlet." Mertz further testified that she was given no reason by her superior when instructed to photograph Bell and Hansjergen.

In *The May Department Stores Company*, 184 NLRB 878, 885 (1970), the Board stated:

Respondent's display of a camera at the employees' entrance during the handbilling activities, irrespective of whether pictures of employees were taken, would inevitably tend to have a coercive and restraining effect upon the employees. The employees would have no knowledge why a camera would be displayed except to gather evidence to be used against them.

While an employer may under certain circumstances photograph union activities,⁸ no justification for Respondent's action has been demonstrated in this proceeding. See *Holly Farms Poultry Industries, Inc.*, 186 NLRB 210, 213 (1970). Indeed, when Mertz was asked why she was instructed to photograph Bell and Hansjergen, she testified that she was given no reason.⁹

⁵ The General Counsel also contends that Respondent violated the Act by ordering Bell and Hansjergen to stop leafleting *outside* the plant gate. I find no evidence of Respondent having done this. On the contrary, I credit Mertz' testimony that Bell and Hansjergen were leafleting outside the gate and that Mertz did not ask them to leave.

⁶ The General Counsel contends that, since Respondent and American are both members of a multiemployer bargaining association, if Bell is considered to be an employee of American she must also be considered to be an employee of Respondent. Since I have found that Bell was not an off-duty employee of American, I need not reach the question. However, even were I to have found Bell to be considered an off-duty employee of American, the General Counsel has cited no cases which stand for the proposition that she must also be considered an employee of Respondent. *Ford Motor Company (Romeo Tractor & Equipment Plant)*, 222 NLRB 855 (1976), cited by the General Counsel, is clearly distinguishable. In *Ford* the Board pointed out that the employee distributing the literature was at all material times "an employee of the Ford Motor Company" (*id.* at 857).

⁷ Mertz corroborated Bell's and Hansjergen's testimony that she rolled down her window to take the initial picture. While Mertz denied that she then got out of her car to take additional pictures, I credit Bell's and Hansjergen's testimony to the contrary.

⁸ An employer may obtain photographic evidence of strike violence and mass picketing for evidence in a subsequent legal proceeding. See *Simplex Time Recorder Company*, 165 NLRB 812, 816 (1967), *enfd.* 401 F.2d 547 (1st Cir. 1968).

⁹ Respondent's brief states that Bell was photographed "for purposes of identification." No such reason was stated by Respondent's representatives who testified at the hearing. More important, however, is the fact that the evidence is uncontroverted that both Bell and Hansjergen had already provided identification on November 27, when requested to do so by the police officer.

Based on the foregoing, I find that Respondent, by photographing the leafleting, created the impression of surveillance among its employees, thereby interfering with the Section 7 rights of its employees, in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. By photographing the distribution of leaflets, Respondent engaged in the surveillance of union activities in violation of Section 8(a)(1) of the Act.
3. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.
4. Respondent did not violate the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find it necessary to order Respondent to cease and desist therefrom and to take affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁰

The Respondent, S. B. Thomas, Inc., Totowa, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:
 - (a) Engaging in surveillance of union activities, including the distribution of leaflets, by photographing such activities.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed under Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Post at its facility in Totowa, New Jersey, copies of the attached notice marked "Appendix."¹¹ Copies of said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

¹⁰ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹¹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that those allegations of the complaint as to which no violations have been found are hereby dismissed.